

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	No. 62577-2-I
)	
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
RYAN BARTOCILLO,)	
)	
Appellant)	FILED: <u>April 26, 2010</u>
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)	

Schindler, J.—Ryan Bartocillo was convicted by a jury of robbery in the first degree and unlawful imprisonment. On appeal, Bartocillo contends that by failing to find that the convictions encompassed the same criminal conduct, the trial court erred in calculating his offender score. Because Bartocillo did not raise the issue of same criminal conduct at sentencing or challenge his offender score, we affirm.

FACTS

In 2007, sisters Lorna Gray, age 85, and Zita Zingmark, age 70, lived together in a house near Greenlake. For approximately two years, Ryan

Bartocillo, the son of a close friend of Zingmark's, had worked for Gray and Zingmark doing yard work, running errands, and doing other jobs around the house. Bartocillo did not have a fixed schedule. Bartocillo had keys to the house and cars and sometimes stayed the night in the basement. Zingmark kept cash in the basement, sorted in envelopes by denomination. Bartocillo knew where the money was kept because he was sometimes present when Zingmark took money out of the envelopes.

In the fall of 2007, Zingmark's husband went to live in a nursing home. Zingmark visited her husband in the nursing home each day and did not return until the late night or early morning hours.

Zingmark testified that during the week preceding November 21, Bartocillo did not come to the house and did not return her phone calls. She also said that around that time, Bartocillo's behavior changed with respect to money. For instance, Zingmark said Bartocillo asked her for money to purchase items but did not return her change.

On the night of November 21, Zingmark was at the nursing home and Gray was at home watching television in her room. Sometime between 9:00 p.m. and 10:00 p.m., Gray heard someone unlocking the padlock on the door. She got up and saw Bartocillo with two companions. Because it was not unusual for Bartocillo to be there or to have friends with him, Gray was unconcerned and returned to her room.

Shortly thereafter, a man came into Gray's room, grabbed her by the

shoulder, and forced her into the bathroom. As that was happening, Gray saw Bartocillo and another companion going down to the basement, and heard him say in Tagalog “not there[,] but in the basement.” Gray said the person who put her in the bathroom also put a cloth over her mouth and soon afterward she lost consciousness on the cold bathroom floor.

Zingmark returned home from the nursing home in a taxi at about 1:45 a.m. When she entered the house, she heard Gray moaning in the bathroom. She unlocked the door and called 911. Gray told Zingmark that Bartocillo “did this to me” with his companions. Gray was taken to the hospital and stayed there for more than a month. A few days after the incident, Zingmark discovered that the money she kept in the basement, approximately \$4,000, was missing.

The State charged Bartocillo with burglary in the first degree, robbery in the first degree, and unlawful imprisonment. After a four-day trial, a jury convicted Bartocillo on the robbery and unlawful imprisonment charges, and acquitted him of burglary.

There was no dispute that Bartocillo had an offender score of two and the sentencing range for robbery in the first degree was 41 to 54 months. The State requested a sentence of 48 months and a concurrent sentence of twelve months on the unlawful imprisonment charge.¹ The defense asked the court to impose “41 months, in essence, the low end.” The court imposed a sentence of 54 months on the robbery charge and a twelve month concurrent sentence on the

¹ The unlawful imprisonment charge had a sentencing range of four to twelve months.

unlawful imprisonment charge.

Bartocillo filed a post-trial motion to amend the judgment asserting that because robbery and unlawful imprisonment encompassed the same criminal conduct, his offender score should have been one. Based on an offender score of one, the highest standard range sentence was 48 months. Because Bartocillo's motion did not meet the criteria of CrR 7.8(b), the court denied the motion.²

ANALYSIS

Bartocillo contends on appeal that the robbery and unlawful imprisonment convictions constitute the same criminal conduct. The State responds that Bartocillo waived his right to challenge the court's failure to find same criminal conduct by failing to raise the issue at sentencing.

In determining a standard sentence range, the trial court counts other prior and current offenses separately to determine the offender score unless one or more of the current offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Offenses constituting the same criminal conduct are counted as one crime when calculating the offender score. RCW 9.94A.589(1)(a); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Separate offenses constitute the same criminal conduct if three elements are present: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. RCW 9.94A.589(1)(a); State v. Haddock, 141 Wn.2d 103, 109-10, 3 P.3d 733 (2000).

² Under CrR 7.8, a motion for relief from judgment may be based upon clerical mistakes, CrR 7.8(a), or mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, void judgment, or "[a]ny other reason justifying relief from the operation of the judgment." CrR7.8(b)(5).

A defendant may waive a challenge to a miscalculated offender score “where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (failure to identify a factual dispute for the court's resolution and to request an exercise of the court's discretion waives challenge to offender score). In Goodwin, the Supreme Court approved of this court's analysis in State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000). After agreeing to his offender score at the sentencing hearing, Nitsch argued on appeal that his offender score was incorrect and that the sentencing court should have found his two crimes encompassed the same criminal conduct. Nitsch, 100 Wn. App. at 520. We held that Nitsch could not raise this argument for the first time on appeal.

Only an illegal or erroneous sentence is reviewable for the first time on appeal. Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion. ...This is not an allegation of pure calculation error. . . . Nor is it a case of mutual mistake regarding the calculation mathematics. Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion.

Nitsch, 100 Wn. App. 520-23.

Thus, because the determination of whether two crimes constitute the same criminal conduct involves both determinations of fact and an exercise of judicial discretion, a defendant may waive the argument. And here, as in Nitsch, we conclude Bartocillo waived his argument regarding same criminal conduct by

not raising it at sentencing.

Bartocillo maintains, however, that notwithstanding his failure to raise the issue of same criminal conduct at sentencing, he is still entitled to raise the issue on appeal. Bartocillo relies on State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009), in which the court held that the defendant's failure to object to his offender score at sentencing did not constitute an affirmative acknowledgment of his criminal history. However, Mendoza involved the adequacy of proof of the defendant's criminal history under the former version of the Sentencing Reform Act (SRA). The decision did not address the issue here, the failure to identify the factual issue of same criminal conduct at sentencing.

STATEMENT OF ADDITIONAL GROUNDS

In his pro se statement of additional grounds for review, Bartocillo challenges the evidence supporting his convictions.³

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences reasonably drawn therefrom. Salinas, 119 Wn.2d at 201.

Both Zingmark and Gray testified about Bartocillo's access to keys and

³ Bartocillo argues there was insufficient corroborating evidence to support his conviction for solicitation. Bartocillo was, however, neither charged with nor convicted of solicitation.

knowledge of the house. Zingmark specifically testified that Bartocillo was aware of where she kept a large amount of cash. Gray was unwavering in her testimony that she saw Bartocillo enter her house using a key on the night of the incident, heard him direct someone to the basement, and observed him going down to the basement. Although Gray testified that Bartocillo was not the person who forced her into the bathroom, locked her in and left there, the jury's finding that Bartocillo was legally responsible for that conduct as an accomplice is amply supported by the evidence.

Bartocillo also challenges the trial court's decision to deny his pretrial request for new counsel.⁴ He claims his counsel had a conflict of interest and because the court failed to grant his motion, he was denied his constitutional right to present a defense. There is no evidence that counsel had an actual conflict of interest. Pretrial, counsel informed the court of a potential ethical conflict under the Rules of Professional Conduct if the defendant testified. The court stated that the issue could be explored fully if it did arise, but because Bartocillo did not testify, his counsel did not raise the issue again.

Nor does the record support Bartocillo's claim that he was denied the right to present a defense.⁵ Bartocillo suggests that his counsel opposed the use of an

⁴ At the hearing on this motion, Bartocillo's counsel stated that Bartocillo had not given a reason why he wanted to fire him. Bartocillo told the court only that he was dissatisfied with counsel's advice and not feel he was presenting a strong defense.

⁵ In support of his statement of additional grounds, Bartocillo submits statements from his mother and brother, who did not testify at trial, stating that he was at home and did not leave on the night of the robbery. These allegations fall outside the record and therefore cannot be considered on direct review. If Bartocillo wishes to bring a claim based upon matters outside the appellate record, he must do so by means of a personal restraint petition. State v. McFarland, 127 Wn.2d 322, 335, 338 n. 5, 899 P.2d

interpreter. This allegation is not supported by the record, and interpreters were, in fact, present during the trial. And, while Bartocillo indicates that his counsel failed to cross examine a police officer regarding advisement of his Miranda⁶ rights, counsel did conduct cross examination on this issue.

1251 (1995).

⁶ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

We affirm.

Schiveller, J.

WE CONCUR:

Spencer, J.

Becker, J.